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January 26, 2023

**VIA ECF**

Hon. Katharine H. Parker  
United States Magistrate Judge  
United States District Court, Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street  
New York, NY 10007

**Re: *Averbach et al. v. Cairo Amman Bank*, 19-cv-00004-GHW-KHP  
Letter Motion Requesting Approval of January 19, 2023, Transcript Errata**

Dear Magistrate Judge Parker:

At Chambers' instruction, and at the request of the transcription service that prepared the transcript for the January 19, 2023, case management conference, we write jointly on behalf of the parties to request that the Court approve the proposed changes to the transcript attached hereto as a clean document in **Exhibit A** and a redline in **Exhibit B**.

Respectfully submitted,

/s/ Dina Gielchinsky

Encls.

cc: All Counsel

The parties' proposed revisions to the transcript from the January 19, 2023 case management conference are APPROVED. The parties shall send a copy of this order to the transcription service that prepared the transcript to request the revisions be implemented.

**SO ORDERED:**

**HON. KATHARINE H. PARKER**  
**UNITED STATES MAGISTRATE JUDGE** 1/27/2023

# Exhibit A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
AVERBACH, et al., : Docket # 1:19-cv-00004-  
 : GHW-KHP  
 :  
Plaintiffs, :  
 :  
- against - :  
 :  
CAIRO AMMAN BANK, : New York, New York  
 : January 19, 2023  
 :  
Defendant. :  
 : TELEPHONIC CASE  
----- : MANAGEMENT CONFERENCE

PROCEEDINGS BEFORE  
THE HONORABLE KATHARINE H. PARKER,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-Direct</u>	<u>Re-Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: Calling 19-cv-004, Averbach vs.  
3 Cairo Amman Bank; the Honorable Katharine H. Parker,  
4 presiding.

5 Beginning with counsel for the plaintiff,  
6 please make your appearance for the record.

7 MS. DINA GIELCHINSKY: Good morning, Your  
8 Honor. This is Dina Gielchinsky from Osen LLC on behalf  
9 of the plaintiffs. I'm joined by my colleagues, Gary  
10 Osen and Michael Radine.

11 THE CLERK: And, counsel for the defendant,  
12 please make your appearance for the record.

13 MR. JONATHAN D. SIEGFRIED: Good morning, Your  
14 Honor; Jonathan Siegfried appearing for CAB. I'm  
15 joined by Andrew Peck, Erin Collins and Margaret  
16 Civetta.

17 HONORABLE KATHARINE H. PARKER (THE COURT):  
18 Good morning. Thank you for your flexibility in  
19 switching to phone today. Because we are on the phone,  
20 I ask that you keep your phones on mute unless you're  
21 speaking and state your name before speaking. Also, I  
22 remind you that the Court's conference line is open to  
23 the press and public on a listen-only basis and that  
24 court rules prohibit others from recording and  
25 rebroadcasting court proceedings.

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So I think there's not too much to report based on your recent letter to the Court, but I did want to get an update on the jurisdictional discovery and also talk about the anticipated motion that defendants want to make.

So where are you on the discovery?

MS. GIELCHINSKY: Your Honor, I can start -- Dina Gielchinsky for the plaintiffs. We received -- as we stated in our last status report, we received Arab Bank's response to our subpoena advising us that they were not able to locate responsive documents. That was basically it under jurisdictional discovery.

With respect to Your Honor's second point, we held a meet-and-confer with the defendant on January 13th, and we just restated our position that jurisdictional briefing should wait until the District Court issues its order on the R & R. And that remains our position.

THE COURT: Okay. Let me hear what the defense position is on the motion to dismiss. Why should it be filed now, as opposed to waiting for a decision on the R & R?

MR. SIEGFRIED: Certainly, Your Honor. Thanks very much. This is Jonathan Siegfried speaking. Your

Honor, last June at our first conference we raised questions as to whether plaintiffs could actually support the jurisdictional allegations in their Second Amended Complaint. Recognizing that jurisdiction is a threshold issue, you directed the parties to engage in jurisdictional discovery and have overseen that discovery for the last seven months. As plaintiffs acknowledge that discovery is now completed and we are prepared to proceed on our motion, which brings us to the issue that plaintiffs now raise, which is that the Court should wait for the District Court to rule on the Report and Recommendation. Simply put, Your Honor, plaintiffs are wrong on the law about that, and they're asking the District Court to either ignore or rule on the issue of specific jurisdiction without regard to the facts.

Let me start with the law, because their legal position is based on a fundamental misapprehension of where we are. A renewed motion to dismiss under 12(b)(2), Your Honor, following jurisdictional discovery is not simply addressed to the pleadings and involves an entirely different legal standard than the pre-discovery legal standard the Court applied in the R & R. Prior to jurisdictional discovery, Your Honor, under well-

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2 established Second Circuit precedent, a plaintiff's  
3 showing of jurisdiction may be established solely by  
4 allegations in the pleading, which are deemed to be true  
5 by the Court. It's quite clear, from what you precisely  
6 state in the R & R.

7 THE COURT: Right.

8 MR. SIEGFRIED: It's the standard you applied.  
9 You found that plaintiffs had made a prima facie showing  
10 of personal jurisdiction based on the allegations in the  
11 Complaint, which are deemed to be true, and from which  
12 you drew all favorable inferences to plaintiffs. That  
13 is not the legal standard following jurisdictional  
14 discovery. The Second Circuit and numerous Courts in  
15 this district have made clear that, following  
16 jurisdictional discovery, a plaintiff's showing must be  
17 factually supported. I think perhaps Judge Engelmayer  
18 put it most succinctly in a couple of cases  
19 (indiscernible) -- I'd refer you perhaps to *Paroni vs.*  
20 *GE UK Holdings*, quote, "After jurisdictional discovery,  
21 admissible evidence, not a party's pleading or say-so,  
22 controls." So we begin with the fact that, given the  
23 procedural posture of the case, we are dealing with an  
24 entirely different legal standard than the legal  
25 standard you applied, which frankly at the moment, Judge



Woods has before him.

That brings -- as I said, they're wrong on the law and I said they're wrong on the facts -- and that brings us to the facts. The evidentiary record that has been established in discovery, as we will show in our motion, shows or provides evidence that directly contradicts the allegations of the pleading, and in other cases does not support it. And Your Honor is very aware of one example in particular because it's been the subject of several conferences. The Complaint alleges that there were 21 transfers to four individuals through CAB's correspondent account at Citibank, including six transfers to one individual who was alleged to have planned one of the attacks. The jurisdictional discovery showed those allegations, which Your Honor expressly referred to in the R & R and deemed to be true, as you were required to, in fact could not be factually supported and were indeed untrue. And you have seen as a result that plaintiffs then changed their entire argument about those transfers and came up with what they call the nesting theory.

And of course that nesting -- they're putting this -- it was not before you when you did the R & R, it's not before Judge Woods. And we also know that the

nesting theory has been rejected, at least by one Court in this district. And we further know, from the jurisdictional discovery, that it wouldn't even apply in this case even were the Second Circuit to uphold it.

So I know we're not going to get -- I don't want to go too deep into the merits here, but basically -- basically, Your Honor, what that argument means is that plaintiffs would have Your Honor stand aside, ignore what is now the evidentiary record and allow the District Court perhaps to adopt findings and conclusions in the R & R which you now know to be incorrect, such as the allegations regarding those transfers. And it would have the District Court rule on a motion based on a pre-discovery legal standard that is no longer relevant to the procedural posture of the case now and to do so without the evidentiary record that now exists and which is relevant to properly deciding whether personal jurisdiction exists.

The idea, Your Honor, that's behind plaintiffs' argument, that Your Honor should stand aside under these circumstances therefore is not only wrong on the law but would result in a total waste of the District Court's time and resources in ruling on that portion of the R & R, where as I said, both the legal standard is no longer

the applicable legal standard under Second Circuit precedent and where the facts are different. And plaintiffs even acknowledge, at least with respect to a number of the nesting transactions, that the facts are different because they no longer claim that those transactions even went through Citibank.

Now, I say we're not -- unless you want me to, I'm not going further into the merits regarding all of the other transactions, but the same types of issues arise when you apply the facts that we now have through jurisdictional discovery to the minimum contacts analysis and the full minimum contacts analysis that is to be applied under the due process clause but, again, not on the basis of the allegations, the jurisdictional allegations in the Complaint, which are at paragraphs five through eight, but on the evidentiary record that has been developed through the jurisdictional discovery that you ordered and supervised and brings us to today.

So our argument and our position is that we should proceed with the motion under the proper standard, under the full evidentiary record, and that Your Honor should rule on that, decide that, and then what Judge Woods would have before him is a ruling on jurisdiction that is made under both the proper legal

standard and upon full evidentiary record rather than ignoring all of that and ruling on something, as I said, that the Second Circuit says is no longer procedurally relevant.

One last point, if I might, Your Honor. And that is -- I might also refer Your Honor to Judge Engelmayer's decision in *Vasquez vs. HSBC* -- it's at 477 F.Supp. 3d 241. There, as here, Your Honor, the Court denied an initial 12(b)(2) motion to dismiss direct to the pleadings. There, as here, the Court ordered jurisdictional discovery. There, as here, jurisdictional discovery was completed. And there, as here, upon completion of jurisdictional discovery, Judge Engelmayer heard a renewed motion to dismiss under 12(b)(2), specifically distinguished between the pre- and post-discovery standards and what he was to look at, and then granted the jurisdictional motion to dismiss that he had previously denied, applying the proper standard applicable to the motion that was made at the time. That is what we are suggesting that we do so that we can engage in an efficient process for resolving the threshold jurisdictional issue.

THE COURT: Okay. So if there's no jurisdiction, that moots the remainder of the objection

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on the R & R or any decision on that remainder of the R  
& R, as well.

MR. SIEGFRIED: Absolutely, which is another  
reason for having it, that threshold issue, correctly  
decided. It doesn't mean that -- I may have disagreed  
and filed objections to your prior conclusion, but it  
doesn't mean that you didn't apply the proper standards  
to the pleadings as alleged and issued your reasoned  
opinion. But what it does mean that we are -- you  
obviously had the authority to order the jurisdictional  
discovery. We are at that point in time, and so you  
should have the opportunity to make that decision. If  
you rule that way, if you rule in our favor this time,  
then that is the issue that will go before Judge Woods;  
and if you ruled in our favor, the defendant's favor, he  
would not reach the 12(b)(6) issues. If you ruled  
against us and he affirmed your ruling, then of course,  
he would have to reach it. But he certainly wouldn't go  
on right now -- not only is he (indiscernible) but would  
be deciding on the wrong legal -- on the not  
procedurally relevant legal standard and ignoring the  
evidence with regard to jurisdiction, but he might also  
then go on to just rule on the 12(b)(6) motion part that  
he wouldn't even need to or properly reach. It cannot

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2 be that that is anything other than a waste of judicial  
3 resources.

4 THE COURT: Right. Okay, so I agree that the  
5 briefing should commence. When will defendant be in a  
6 position to file a moving brief?

7 MR. SIEGFRIED: Your Honor, you may recall that  
8 the plaintiffs gave us a chart, and they gave that same  
9 chart to Your Honor, listing all of their transactions.  
10 I don't believe that any of the discovery that occurred  
11 subsequent to that chart resulted or would have resulted  
12 in any additions to that chart. If that is the chart,  
13 then we would be prepared to move forward with our  
14 moving brief on, say, if you gave us a few weeks to --

15 THE COURT: (Indiscernible)

16 MR. SIEGFRIED: I'm sorry?

17 THE COURT: Could you do it by January 31?

18 MR. SIEGFRIED: We could, Your Honor. I think  
19 that's a -- what is that, two weeks, I think, from where  
20 we are today. I think I'd prefer three weeks, just  
21 because we have a foreign client and therefore,  
22 obviously, we would want to be able to draft and be able  
23 to have them see what we're doing. So I'd prefer three  
24 weeks; but if you wanted -- you know, required us to do  
25 it by the 31st, we would do it.

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2 THE COURT: Are there any changes to the chart  
3 that plaintiffs wanted to make?

4 MS. GIELCHINSKY: Yes, Your Honor. We can  
5 send an updated chart.

6 And if I could just be heard also on  
7 Mr. Siegfried's points? Because he brought up Vasquez,  
8 which has a significant distinction from the procedural  
9 posture here in that Judge Engelmayer denied the motion  
10 to dismiss without prejudice and authorized  
11 jurisdictional discovery. So a renewed 12(b)(2) motion  
12 in that case procedurally is the way to go. Here, the  
13 Report and Recommendation recommended denial but without  
14 jurisdictional discovery. Jurisdictional discovery was  
15 eventually ordered, but we have a Report and  
16 Recommendation denying the defendant's motion to dismiss  
17 on personal jurisdiction grounds. So, this would be a  
18 successive motion to dismiss. What I'm hearing and what  
19 I think would have to happen now is that the defendant  
20 would need to move to vacate the Report and  
21 Recommendation that's outstanding or somehow it would  
22 need to be withdrawn for this to be procedurally  
23 appropriate.

24 THE COURT: Well, they could also move for  
25 summary judgment, couldn't they?

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2 MS. GIELCHINSKY: They could move for summary  
3 judgment, yes; yes, they could --

4 THE COURT: Under Rule 56.

5 MS. GIELCHINSKY: Yes.

6 MR. SIEGFRIED: Your Honor, two points. First  
7 of all, the 12(b)(2) motion post jurisdictional  
8 discovery applies under, again, Second Circuit  
9 precedent; and, again, Judge Engelmayer has this in his  
10 decision, as do other courts. It applies the Rule 56  
11 legal standards in terms of that the motion must be --  
12 the plaintiffs are required to actually support the  
13 allegations, affidavits are supposed to be -- are to be  
14 on the basis of personal knowledge, documents have to be  
15 authenticated. So the legal standard, the Rule 56 legal  
16 standards is to admissibility of evidence and the like,  
17 are all applicable. It doesn't have to be Rule 56  
18 motions. Number two, the --

19 THE COURT: But in this case, if the Court  
20 doesn't have subject matter jurisdiction, that can be  
21 raised at any time.

22 MR. SIEGFRIED: Yes. I'm just simply saying  
23 the point that Your Honor -- I didn't see that Your  
24 Honor issued the Report and Recommendation with  
25 prejudice, either.



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2 THE COURT: No. No, no.

3 MR. SIEGFRIED: Your Honor obviously ordered  
4 jurisdictional discovery, so I fail to grasp the legal  
5 significance of counsel's point. Jurisdictional  
6 discovery was ordered by you. It is now concluded, and  
7 you can always issue a supplemental Report and  
8 Recommendation so that the -- indeed, the whole purpose  
9 of the Federal Magistrates Act is to enforce and  
10 conserve judicial resources and to do things  
11 efficiently. So here we are. You had moved  
12 efficiently. You took the case, you ordered the  
13 discovery. We're applying for a motion, we can have our  
14 motion up in two or three weeks, whichever you decide,  
15 and then you can issue a supplemental Report and  
16 Recommendation if you choose.

17 THE COURT: Well, I want to hear the remainder  
18 of the plaintiffs' counsel's point.

19 MS. GIELCHINSKY: Are we --

20 THE COURT: (Indiscernible)

21 MS. GIELCHINSKY: Well, I would also -- I  
22 mean, besides procedurally, this affects his motion to  
23 dismiss, unless the Report and Recommendation is somehow  
24 withdrawn. It's just not the proper vehicle right now  
25 for the defendant to use until we have an order from the

1  
2 District Court.

3 I'd also just point out that the Report and  
4 Recommendation didn't rely for personal jurisdiction  
5 purposes in finding personal jurisdiction on any of the  
6 transactions that are now, you know, proposed under  
7 nesting theories. The Report and Recommendation found  
8 that, you know, the properly - plaintiffs properly  
9 alleged that the aid provided to Hamas came about via  
10 money transfers through CAB's New York correspondent  
11 accounts. The defendant made the argument already that  
12 the 23 transfers initially alleged were decidedly not  
13 the proximate cause of plaintiffs' injuries.

14 But that wasn't the standard; the Court said  
15 that's not the standard. And, in any event, it doesn't  
16 change -- the jurisdictional discovery under which now  
17 we have 113 transfers totaling \$7.5 million dollars, as  
18 opposed to 23 transfers totaling \$135,000, doesn't  
19 change the jurisdictional analysis on the specific  
20 customers; that's not what the personal jurisdiction  
21 analysis is contingent on. This Court rightly conducted  
22 an analysis comparing the number of transfers to *Licci's*  
23 dozens of transfers and *Indosuez's* six transfers and  
24 came up with its conclusion that plaintiff had made a  
25 prima facie showing of personal jurisdiction. So the

1 facts don't change it.

2           So it's not -- the 12(b)(2) motion, this is not  
3 the right vehicle right now. What plaintiffs propose  
4 the state of play would be is that the District Court  
5 issue an order on the Report and Recommendation. If the  
6 Court determines, if the District Court determines that  
7 the plaintiffs have failed to state a claim under JASTA  
8 or to satisfy personal jurisdiction elements, then we  
9 might need to amend. And if not, the Court's actual  
10 holding I think will make it much clearer what  
11 defendant's motion should be, whether it is a motion to  
12 reconsider or a Rule 56 motion or maybe -- maybe it  
13 would be appropriate at that point for defendant to  
14 submit a Rule 12(b)(2) motion. But, you know, at that  
15 point defendant can submit a pre-motion letter outlining  
16 what it's going to do.

17           MR. SIEGFRIED: If Your Honor wants me to  
18 respond, I will, but I think --

19           THE COURT: I don't -- well, we're getting into  
20 some of the merits. I don't see a reason procedurally  
21 why this motion shouldn't be teed up. It can be teed up  
22 either as -- it can be teed up as a Rule 12 and/or Rule  
23 56 motion, frankly. And I'm not making any decisions on  
24 the merits. Both sides are making reasoned arguments,  
25

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2 and I'm going to have to consider them both carefully  
3 after it's briefed. But procedurally, I don't see why  
4 we can't set a schedule because these are  
5 (indiscernible) that are briefed, anyway. Plaintiffs  
6 have to add the transactions that you found during --  
7 the additional transactions and provide that list. Can  
8 you do that in a week from today?

9 MS. GIELCHINSKY: Yes, Your Honor.

10 THE COURT: Okay. So it --

11 MS. GIELCHINSKY: Your Honor --

12 THE COURT: If you provide --

13 MS. GIELCHINSKY: I'm so sorry to interrupt.

14 THE COURT: Yes, go ahead.

15 MS. GIELCHINSKY: I'm so sorry, Your Honor.

16 This is difficult on the phone. I'm just -- I'm here  
17 with my colleague Gary Osen, and he was just hoping to  
18 make a point to add.

19 THE COURT: Okay.

20 MR. GARY OSEN: Yes, Your Honor. Gary Osen for  
21 the plaintiff. Do I understand firstly that Your Honor  
22 is issuing an order vacating the R & R?

23 THE COURT: No, absolutely not. I'm just  
24 ordering briefing on post-jurisdictional discovery.  
25 Judge Woods, I don't know when he's going to rule on the

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2 objections to the R & R. He may rule on it before this  
3 is even fully briefed.

4 MR. OSEN: Well, then, Your Honor --

5 THE COURT: So this may be a completely moot  
6 point.

7 MR. OSEN: So, but, Your Honor, here's the  
8 question procedurally in terms of the schedule.  
9 Ordinarily, again, because this is a strange procedural  
10 animal, the defendant has not cited any case  
11 (indiscernible) -- and Vasquez is not on point -- on  
12 what happens in a case where jurisdiction has been found  
13 sufficient, as the R & R indicates. And then there's  
14 discovery subsequent to that where it's a 12(b)(2)  
15 motion as opposed to a Rule 56. But the issue is even  
16 more complex here, and this is why I wanted to interject  
17 for a moment, because the nature of the claim, that is,  
18 the transactional record here, is intrinsically tied up  
19 with the merits. And the defendants' arguments and  
20 their objections, for example, raise issues of proximate  
21 cause, which of course is directly -- goes to the merits  
22 of the case.

23 So, I don't know how in a circumstance like  
24 this we would be able to respond to a brief that didn't  
25 have an operative Complaint that incorporated not just

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2 the transactions that are reflected in the chart but  
3 also reflect the corresponding allegations that tie the  
4 transactions to unlawful conduct. So, it's just a  
5 procedural question as to how they move under 12(b)(2)  
6 against a Complaint that doesn't have not just all the  
7 transactions but also the factual allegations that  
8 connect those transactions to the arising-from element  
9 of personal jurisdiction.

10 THE COURT: Well, look, that -- what you're  
11 arguing there is that can't be decided because of its  
12 inter -- one, you're saying it's Rule 56; that if it  
13 is -- I mean, I think defendants would be wise to  
14 characterize it as either/or -- but what I'm hearing is  
15 plaintiffs are arguing that under Rule 56(f) you would  
16 need more discovery because it's intertwined. I don't  
17 know if that's the case or not; I'm not making a  
18 decision on that in this call. What I'm saying -- and  
19 I'm not aware of any reason why this motion can't be  
20 teed up. So I'm going to start a briefing schedule.  
21 And under --

22 MR. OSEN: But, Your Honor, again -- Your  
23 Honor, the question isn't about the briefing schedule;  
24 the question is about what Complaint they're moving  
25 against.

THE COURT: And you want to amend the Complaint to add additional information for jurisdiction? I don't know if that's required, given that you've had discovery and you will be able to submit the additional transactions by affidavit. I think both sides are going to be in agreement about the transactions that you found, what they are. And then you'll argue about the significance of the nested transaction and so forth.

MR. OSEN: Your Honor, this is Gary Osen again. I think there's a missing component here. And let me give you a concrete example. There are multiple entities in the transactional record that are jurisdictionally relevant from the plaintiffs' standpoint but for which there are no allegations in the Complaint about them. And I don't mean the transactions themselves; I mean who the counterparties to the transactions are. So, for example, just to take one at random, the Halhul (ph) Zakat Committee, which was on the list of HLF unindicted co-conspirators. That's not in the Complaint currently, the operative version, but there are transactions to an account for Cairo Amman Bank for that entity. There are no allegations in the Complaint setting forth the relationship of the Halhul Zakat Committee to Hamas. So, it's not simply a

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2 question of putting in an affidavit as to the  
3 transactions; it's holistic. The Complaint and the  
4 transactions can only be evaluated together because the  
5 transactions themselves are the *actus reus*, if you will,  
6 the act of material support or substantial assistance  
7 that gives rise to the plaintiffs' claim.

8 MR. SIEGFRIED: Your Honor, if I might --

9 THE COURT: So you want to -- what you want to  
10 do is amend the Complaint to shore up and add the  
11 information that you found during jurisdictional  
12 discovery; is that what you're saying?

13 MR. OSEN: In order -- yes, in order to -- of  
14 course, we oppose any -- just so the record's clear, we  
15 think it's an improper motion, but if Your Honor's going  
16 to entertain it, then it should be against an operative  
17 Complaint that contains both the transactional record,  
18 which of course, will be reflected in the chart, but  
19 also reflect --

20 THE COURT: I mean, the Complaint is already  
21 like --

22 MR. OSEN: -- the allegation --

23 THE COURT: Mr. Osen, the Complaint's already  
24 like 250 pages. It's really long. I mean, what --

25 MR. OSEN: Your Honor, that's a function --



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2 THE COURT: -- you're now going to add  
3 additional entities? That's sort of changing the  
4 target, isn't it?

5 MR. OSEN: It's what comes about as a result of  
6 discovery. I mean --

7 MR. SIEGFRIED: Your Honor, may I -- I'm sorry.

8 MR. OSEN: Let me just conclude. Your Honor,  
9 if defendant is going to be permitted, as we think it's  
10 wholly improper procedurally, but if the defendant is  
11 going to be permitted to proceed in this fashion, then  
12 it must be against an operative Complaint that contains  
13 the plaintiffs' allegations in full and which reflect  
14 the discovery that has been yielded in this case.

15 THE COURT: Okay, I'm just not sure that's the  
16 case because we have a notice pleading standard; and to  
17 the extent there is additional facts that demonstrate,  
18 in your view, that the defendant was engaging in serving  
19 a customer to aid terrorism, I don't understand why all  
20 of those transactions have to be in the Complaint.  
21 That's not the way it normally works. Normally, there's  
22 notice pleading and then there's discovery and then  
23 additional facts are brought to bear without amending  
24 the Complaint. So I'm not sure that I agree with you,  
25 Mr. Osen, that it's necessary to be in the Complaint.

1  
2 I'd like to hear from defendants on that.

3 MR. OSEN: Your Honor, may I, Your Honor?  
4 Apologies. One last point on that before you hear from  
5 defendant?

6 To be clear, on a 12(b)(2) motion, the  
7 allegations in the Complaint, even on a renewed 12(b)(2)  
8 are deemed to be true for purposes of the motion, with  
9 the exception of the jurisdictional component, which is  
10 based on the facts produced or the evidence produced.  
11 So the issue isn't whether we append or integrate 100-  
12 plus transactions into the Complaint; it's the  
13 allegations concerning the entities who are the  
14 customers of the bank that are germane. And there are  
15 only two ways that that can be accomplished, either by  
16 amending the Complaint and treating those allegations as  
17 true, or doing this at summary judgment after completion  
18 of fact and expert discovery. And if the defendants  
19 want to move under -- without full discovery, then it  
20 has to be procedurally against an operative Complaint  
21 that incorporates those allegations. Otherwise, we say  
22 in our papers, well, look, there's a transaction for the  
23 Halhul Zakat Committee, and the defendant says, "Who is  
24 that? They're not the Complaint; that has no  
25 jurisdictional relevance."

1  
2 MR. SIEGFRIED: Your Honor, would you like me  
3 to comment at this point?

4 THE COURT: Yes. Go ahead.

5 MR. SIEGFRIED: Briefly, Mr. Osen needs to  
6 refer to the law, (indiscernible). I do not know of any  
7 case that supports a good bit of what he said, but he  
8 will make those arguments in response to the motion, I  
9 guess.

10 With respect to this whole idea of amending the  
11 Complaint, Your Honor has it precisely correct. There  
12 is nothing -- he has -- you have allowed three  
13 amendments -- not you've allowed -- there was an initial  
14 Complaint; you have permitted two amendments of the  
15 Complaint already. So we have versions 1.0, 2.0 and  
16 3.0. He now says I want to amend the Complaint again  
17 based upon the jurisdictional discovery. That is what  
18 the plaintiffs are contending. The jurisdictional  
19 discovery that he refers to is the jurisdictional  
20 discovery that he and the plaintiffs produced to us  
21 specifically. Documents that were produced by Arab Bank  
22 in *Linde* -- you're quite familiar with those, I know,  
23 because you had the whole subpoena issue about that; and  
24 of course, it was unsurprising that Arab Bank has now  
25 come back and said we don't have any additional

documents beyond those that we previously provided to plaintiffs. They are the documents -- and those were produced back in 2006 or something like that, '07. He has documents from the HLF criminal trial which were in his possession that he produced to us, that were produced and therefore in his possession since, I believe, around 2008. And he has documents from the NatWest proceedings where Mr. Osen was the counsel and where the documents produced in NatWest; and those -- I don't know exactly when they were produced, but they were certainly produced prior to 2016, I assume some point between 2007 and 2016.

So for Mr. Osen -- and Mr. Osen drafted in 2019, so anywhere from six to 10 years after these documents were in his possession -- he drafted the CAB Complaint. And he now says, oh, I should be allowed to now do a fourth amendment of the Complaint to allege facts that I have in my possession that I could have asserted previously and therefore let me first go and amend my Complaint. This argument is also different than what the plaintiff said in court to you two or three months ago, where they referred to amending the Complaint to add transactions they learned about after filing the Amended Complaint. There were no

transactions thus far that I'm aware of that they found about after filing the Amended Complaint. All of the transactions occurred before. If they have something that they want to do under the 12(b)(2) motion -- and perhaps we will restate it as an alternative, as you suggest -- and a Rule 56 -- they have the ability to put in factual evidence in support of an allegation. But other than -- other than giving this -- the chart, the jurisdictional allegations in this Complaint are in paragraphs five through eight. We are obviously not going to move on -- I assume he has changed his theory, we'll see his chart, assuming this chart is the chart we're moving under. Those are the allegations, he has the facts, we will make our arguments. He will have an opportunity to put in his factual support for the allegations. It's a 12(b)(2) post-jurisdictional motion. Again, I don't emphasize a distinction between that and the legal standard under Rule 56 because the Court says it's really the same. It is by definition a motion outside of the pleadings. So as long as he has factual evidence to support his assertion that the transaction that the claims arise out of or relate to the transaction, he is entitled to put that in. It's not --

1 PROCEEDINGS 28

2 THE COURT: Okay. I've --

3 MR. SIEGFRIED: -- he cannot -- and he can't  
4 prevail on an allegation, so there's no reason for --

5 THE COURT: Okay. Thank you.

6 MR. SIEGFRIED: -- for that.

7 THE COURT: I have heard enough from both  
8 sides. I am going to allow the motion. Plaintiffs  
9 should provide an updated chart by January 27th.  
10 Defendants should then file their motion by February 17.  
11 It should be a motion under Rule 12; or, in the  
12 alternative, under 56. And the plaintiffs should file  
13 their opposition -- let's see, I said the 17th --  
14 opposition due March 10; reply due March 24.

15 And you can make whatever procedural -- to the  
16 extent plaintiffs want to make a procedural argument and  
17 you think it's 56 versus Rule 12, go right ahead; I'll  
18 take a look at that. And, you know, I'll evaluate  
19 everybody's arguments carefully once it's fully briefed.

20 MR. OSEN: This is Gary Osen, Your Honor. Two  
21 points, if I may? One on the schedule. I think, if I  
22 heard correctly, we get a week less time than the  
23 defendant for our --

24 THE COURT: No. I'm giving them three weeks  
25 after you give them the renewed charts.

1 PROCEEDINGS 29

2 MR. OSEN: Right. And then we have until when?

3 THE COURT: So I was going to give you three  
4 weeks. Is that --

5 MR. OSEN: What was the date for our response?

6 THE COURT: So theirs was going to be due  
7 February 17, and I was going to have yours due  
8 March 10th.

9 MR. OSEN: Okay, that's fine, Your Honor.

10 THE COURT: And then reply due the 24th.

11 MR. OSEN: The other issue, Your Honor, is, is  
12 it possible if you can set forth in your minute order so  
13 that we have a record that you denied leave to amend?

14 THE COURT: Well, there has not been a formal  
15 motion to amend, so I have not ruled on such a motion.  
16 If you want to make a motion to amend, you have to  
17 prepare an Amended Complaint, you have to seek the  
18 defendant's permission to make that amendment. If they  
19 don't agree, then you have to make a motion. So I have  
20 not ruled on a motion to amend; I have not denied a  
21 motion to amend. That has not been briefed. I haven't  
22 seen an Amended Complaint, nor has defendant. So I'm  
23 not going to include that in the minute entry.

24 MR. OSEN: Okay, Your Honor, I understand. My  
25 question, then, is this: To the extent that the

1 PROCEEDINGS 30

2 defendant is moving on February 17th, they'll be moving  
3 against the operative Complaint plus the chart, as I  
4 understand that; is that correct?

5 THE COURT: That's what I understand.

6 MR. OSEN: Okay. And so depending -- I mean,  
7 one way, of course, that would clarify this further is  
8 if the defendant actually filed a pre-motion letter that  
9 set forth exactly what the basis of the motion is. Then  
10 we could at least ascertain whether we're proceeding  
11 under one theory or another and what the evidentiary  
12 standard is.

13 THE COURT: I don't know that that is  
14 necessary. I'm going to -- I'm waiving the requirement  
15 of a pre-motion letter because we've been talking about  
16 this for every single court conference since we've been  
17 doing jurisdictional discovery. I don't think it's any  
18 secret as to what the defendant's theory is.

19 MR. OSEN: I still don't understand what the  
20 theory is, but perhaps Your Honor can enlighten us.

21 THE COURT: Well, I think the defendant is in  
22 the best position to do that. But the basic thing that  
23 they've described is that the allegations in the  
24 Complaint are not true, that your theory of jurisdiction  
25 has changed; and they're moving on that basis. That's



1 PROCEEDINGS 31

2 my understanding. I don't know if that's correct or  
3 not. I'll take a look at the briefing. And I  
4 understand you to be saying jurisdictional discovery has  
5 only increased the jurisdictional basis to be here  
6 because you've got more transactions. That is the  
7 dispute, as I understand it.

8 MR. OSEN: Okay. I guess the question is,  
9 then, just for us, because I don't want the Court to,  
10 you know, be blindsided here, but obviously, depending  
11 on what we receive on January 20 -- I'm sorry, on  
12 February 17th from the defendant, we may very well move  
13 to amend the Complaint or move to convert it to a Rule  
14 56 motion, depending on what we see --

15 THE COURT: Sure, absolutely.

16 MR. OSEN: -- and that might affect the  
17 schedule, of course.

18 THE COURT: Okay.

19 MR. OSEN: All right. Thank you.

20 THE COURT: That's within your right, if you  
21 think that's appropriate.

22 Anything else?

23 MR. SIEGFRIED: Not from defendant. Thank you,  
24 Your Honor.

25 THE COURT: Okay. Well, thanks, everybody.

1 PROCEEDINGS 32

2 I'll look forward to reviewing your papers.

3 MR. SIEGFRIED: Your Honor, actually -- I'm  
4 sorry, I just feel like -- are we still following your -  
5 - are we --

6 THE COURT: My schedule? Yes.

7 MR. SIEGFRIED: No, no, no, the page limit, the  
8 page limit to 25 pages.

9 THE COURT: Yes, definitely the page limit.  
10 Yes.

11 MR. SIEGFRIED: Okay. Thank you, Your Honor.

12 THE COURT: Okay. Thank you. I'll issue a  
13 Scheduling Order. Thank you. Bye-bye.

14 (Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Averbach et al v. Cairo Amman Bank, Docket #19-cv-00004-GHW-KHP, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature \_\_\_\_\_

Carole Ludwig

Date: January 23, 2023

# Exhibit B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
AVERBACH, et al., : Docket # 1:19-cv-00004-  
 : GHW-KHP  
 :  
Plaintiffs, :  
 :  
- against - :  
 :  
CAIRO AMMAN BANK, : New York, New York  
 : January 19, 2023  
 :  
Defendant. :  
 : TELEPHONIC CASE  
----- : MANAGEMENT CONFERENCE

PROCEEDINGS BEFORE  
THE HONORABLE KATHARINE H. PARKER,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

PROCEEDINGS

3

THE CLERK: Calling 19-cv-004, Averbach vs. Cairo Amman Bank; the Honorable Katharine H. Parker, presiding.

Beginning with counsel for the plaintiff, please make your appearance for the record.

MS. DINA GIELCHINSKY: Good morning, ~~your~~ Honor. This is Dina Gielchinsky from Osen LLC on behalf of the plaintiffs. I'm joined by my colleagues, Gary Osen and Michael Radine.

THE CLERK: And, counsel for the defendant, please make your appearance for the record.

MR. JONATHAN D. SIEGFRIED: Good morning, ~~your~~ Honor; Jonathan Siegfried appearing for CAB. I'm joined by Andrew Peck, Erin Collins and Margaret Civetta.

HONORABLE KATHARINE H. PARKER (THE COURT): Good morning. Thank you for your flexibility in switching to phone today. Because we are on the phone, I ask that you keep your phones on mute unless you're speaking and state your name before speaking. Also, I remind you that the Court's conference line is open to the press and public on a listen-only basis and that court rules prohibit others from recording and rebroadcasting court proceedings.

PROCEEDINGS

4

1  
2 So I think there's not too much to report based  
3 on your recent letter to the Court, but I did want to  
4 get an update on the jurisdictional discovery and also  
5 talk about the anticipated motion that defendants want  
6 to make.

7 So where are you on the discovery?

8 MS. GIELCHINSKY: Your Honor, I can start --  
9 Dina Gielchinsky for the plaintiffs. We received -- as  
10 we stated in our last status report, we received ~~the~~  
11 Arab Bank's response to our subpoena advising us that  
12 they were not able to locate responsive documents. That  
13 was basically it under jurisdictional discovery.

14 With respect to ~~your Honor~~Your Honor's second  
15 point, we held a meet-and-confer with the defendant on  
16 January 13th, and we just restated our position that  
17 jurisdictional briefing should wait until the District  
18 Court issues its order on the R & R. And that remains  
19 our position.

20 THE COURT: Okay. Let me hear what the defense  
21 position is on the motion to dismiss. Why should it be  
22 filed now, as opposed to waiting for a decision on the  
23 R & R?

24 MR. SIEGFRIED: Certainly, ~~your Honor~~Your  
25 Honor. Thanks very much. This is Jonathan Siegfried



1 speaking. Your Honor, last June at our first conference  
2 we raised questions as to whether plaintiffs could  
3 actually support the jurisdictional allegations in their  
4 Second Amended Complaint. Recognizing ~~that~~  
5 jurisdiction is a threshold issue, ~~you~~ you directed the  
6 parties to engage in jurisdictional discovery and have  
7 overseen that discovery for the last seven months. As  
8 plaintiffs acknowledge that discovery is now completed  
9 and we are prepared to proceed on our motion, which  
10 brings us to the issue that plaintiffs now raise, which  
11 is that the Court should wait for the District Court to  
12 rule on the Report and Recommendation. Simply put, ~~your~~  
13 ~~Honor~~ Your Honor, plaintiffs are wrong on the law about  
14 ~~that~~, and they're asking the District Court to either  
15 ignore or rule on the issue of specific jurisdiction  
16 without regard to the facts.

18 Let me start with the law, because their legal  
19 position is based on a fundamental misapprehension of  
20 where we are. A renewed motion to dismiss under  
21 12(b)(2), ~~your Honor~~ Your Honor, following jurisdictional  
22 discovery is not simply addressed to the pleadings and  
23 involves an entirely different legal standard than the  
24 pre-discovery legal standard the Court applied in the R  
25 & R. Prior to jurisdictional discovery, ~~your Honor~~ Your

Honor, under well-established Second Circuit precedent, a plaintiff's showing of jurisdiction may be established solely by allegations in the pleading, which are deemed to be true by the Court. It's quite clear, from what you precisely state in the R & R.

THE COURT: Right.

MR. SIEGFRIED: It's the standard you applied. You found that plaintiffs had made a prima facie showing of personal jurisdiction based on the allegations in the Complaint, which are deemed to be true, and from which you drew all favorable inferences to plaintiffs. That is not the legal standard following jurisdictional discovery. The Second Circuit and numerous Courts in this district have made clear that, following jurisdictional discovery, a plaintiff's showing must be factually supported. I think perhaps ~~just as~~ Judge Engelmayer put it most succinctly in a couple of cases (indiscernible) -- I'd refer you perhaps to *Paerzoni vs. GE UK Holdings*, quote, "After jurisdictional discovery, admissible evidence, not a party's pleading or say-so, controls." So we begin with the fact that, given the procedural posture of the case, we are dealing with an entirely different legal standard than the legal standard you applied, which frankly at the moment, Judge

1 Woods has before him.

2 That brings -- as I said, they're wrong on the  
3 law and I said they're wrong on the facts -- and that  
4 brings us to the facts. The evidentiary record that has  
5 been established in discovery, as we will show ~~in~~at our  
6 motion, shows or provides ~~as~~ evidence that directly  
7 contradicts the allegations of the pleading, and in  
8 other cases does not support it. And Y~~y~~our Honor is  
9 very aware of one example in particular because it's  
10 been the subject of several conferences. The Complaint  
11 alleges that there were 21 transfers to four individuals  
12 through CAB's correspondent account at Citibank,  
13 including six transfers to one individual who was  
14 alleged to have planned one of the attacks. The  
15 jurisdictional discovery showed those allegations, which  
16 ~~your Honor~~Your Honor expressly referred to in the R & R  
17 and deemed to be true, as you ~~+~~were  
18 required~~indiscernible~~ to, in fact could not be  
19 factually supported and were indeed untrue. And you  
20 have~~d~~ seen as a result that plaintiffs then changed  
21 their entire argument about those transfers and came up  
22 with what they call the nesting theory.

23 And of course that nesting -- they're putting  
24 this -- it was not before you when you did the R & R,  
25

1  
2 it's not before Judge Woods. And we also know that the  
3 nesting theory has been rejected, at least by one Court  
4 in this district. And we further know, from the  
5 jurisdictional discovery, that it wouldn't even apply in  
6 this case even were the Second Circuit to uphold it.

7           So I know we're not going to get -- I don't  
8 want to go too deep into the merits here, but basically  
9 -- basically, Your Honor, what that argument means ~~and~~  
10 ~~what~~ -- is that plaintiffs would have Your Honor stand  
11 aside, ignore what is now the evidentiary record and  
12 allow the District Court perhaps to adopt findings and  
13 conclusions in the R & R which you now know to be  
14 incorrect, such as the allegations regarding those  
15 transfers. And it would have the District Court rule on  
16 a motion based on a pre-discovery legal standard that is  
17 no longer relevant to the procedural posture of the case  
18 now and to do so without the evidentiary record that now  
19 exists and which is relevant to properly deciding  
20 whether personal jurisdiction exists.

21           The idea, Your Honor, that's behind  
22 plaintiffs' argument, that Your Honor should stand  
23 aside under these circumstances therefore is not only  
24 wrong on the law but would result in a total waste of  
25 the District Court's time and resources in ruling on

that portion of the R & R, where as I said, both the legal standard is no longer the applicable legal standard under Second Circuit precedent and where the facts are different. And plaintiffs even acknowledge~~s~~, at least with respect to a number of the nesting transactions, that the facts are different because they no longer claim that those transactions even went through Citibank.

Now, I say we're not -- unless you want me to, I'm not going further into the merits regarding all of the other transactions, but the same types of issues arise when you apply the facts that we now have through jurisdictional discovery to the ~~M~~minimum ~~E~~contacts ~~A~~analysis and the ~~F~~full ~~M~~minimum ~~E~~contacts ~~a~~Analysis that is to be applied under the due process clause but, again, not on the basis of the allegations, the jurisdictional allegations in the Complaint, which are at paragraphs five through eight, but on the evidentiary record that has been developed through the jurisdictional discovery that you ordered and supervised and brings us to today.

So our argument and our position is that we should proceed with the motion under the proper standard, under the full evidentiary record, and~~but~~ that

1  
2 Y~~y~~our Honor should rule on that, decide that, and then  
3 what Judge Woods would have before him is a ruling on  
4 jurisdiction that is made under both the proper legal  
5 standard and upon full evidentiary record rather than  
6 ignoring all of that and ruling on something, as I said,  
7 that the Second Circuit says is no longer procedurally  
8 relevant.

9 One last point, if I might, ~~your Honor~~Your  
10 Honor.? And that is -- I might also refer Y~~y~~our Honor  
11 to Judge Engelmayer's decision in *Vasquez vs. HSBC* --  
12 it's at 477 F.Supp. 3d 241. There, as here, ~~your~~  
13 ~~Honor~~Your Honor, the Court denied an initial 12(b)(2)  
14 motion to dismiss direct to the pleadings. There, as  
15 here, the Court ordered jurisdictional discovery.  
16 There, as here, jurisdictional discovery was completed.  
17 And there, as here, upon completion of jurisdictional  
18 discovery, Judge Engelmayer heard a renewed motion to  
19 dismiss under 12(b)(2), specifically distinguished  
20 between the pre- and post-discovery standards and what  
21 he was to look at, and and then granted the jurisdictional  
22 motion to dismiss that he had previously denied,  
23 applying the proper standard applicable to the motion  
24 that was made at the time. That is what we are  
25 suggesting that we do so that we can engage in an

efficient process for resolving the threshold jurisdictional issue ~~(indiscernible)~~.

THE COURT: Okay. So if there's no jurisdiction, that moots the remainder of the objection on the R & R or any decision on that remainder of the R & R, as well.

MR. SIEGFRIED: Absolutely, which is another reason for having it, that threshold issue, correctly decided. It doesn't mean that -- I may have disagreed and filed objections to your prior conclusion, but it doesn't mean that you didn't apply the proper standards to the pleadings as alleged and issued d your reasoned opinion. But what it does mean that we are -- you obviously had the authority to order the jurisdictional discovery. We are at that point in time, and so you should have the opportunity to make that decision. If you rule that way, if you rule in our favor this time, then that is the issue that will go before Judge Woods; and if you ruled in our favor, the defendant's favor, he ~~it~~ would not reach the 12(b)(6) issues. If you ruled against us and he affirmed your ruling, then of course, he would have to reach it. But he certainly wouldn't go on right now -- not only is he (indiscernible) but would be deciding on the wrong legal -- on the not

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2 procedurally relevant legal standard and ignoring the  
3 evidence with regard to jurisdiction, but he might also  
4 then go on to just rule on the 12(b)(6) motion part that  
5 he wouldn't even need to or properly reach. It cannot  
6 be that that is anything other than a waste of judicial  
7 resources.

8 THE COURT: Right. Okay, so I agree that the  
9 briefing should commence. When will defendant ~~s~~ be in a  
10 position to file a moving brief?

11 MR. SIEGFRIED: Your Honor, you may recall that  
12 the plaintiffs gave us a chart, and they gave that same  
13 chart to ~~your Honor~~ Your Honor, listing all of their  
14 transactions. I don't believe that any of the discovery  
15 that occurred subsequent to that chart resulted or would  
16 have resulted in any additions to that chart. If that  
17 is the chart, then we would be prepared to move forward  
18 with our moving brief on, say, if you gave us a few  
19 weeks to --

20 THE COURT: ~~-(Indiscernible)~~

21 MR. SIEGFRIED: I'm sorry?

22 THE COURT: Could you do it by January 31?

23 MR. SIEGFRIED: We could, ~~your Honor~~ Your Honor.  
24 I think that's a -- what is that, two weeks, I think,  
25 from where we are today. I think I'd prefer three



1 weeks, just because we have a foreign client and  
2 therefore, obviously, we would want to be able to draft  
3 and be able to have them see what we're doing. So I'd  
4 prefer three weeks; but if you wanted -- you know,  
5 required us to do it by the 31st, we would do it.

6  
7 THE COURT: Are there any changes to the chart  
8 that plaintiffs wanted to make?

9 MS. GIELCHINSKY: Yes, ~~your Honor~~Your Honor.  
10 We can send an updated chart.

11 And if I could just be heard also on  
12 Mr. Siegfried's points? Because he brought up *Vasquez*,  
13 which has a significant distinction from the procedural  
14 posture here in that Judge Engelmayer denied the motion  
15 to dismiss without prejudice and authorized  
16 jurisdictional discovery. So a renewed 12(b)(2) motion  
17 in that case procedurally is the way to go. Here, the  
18 Report and Recommendation recommended denial but without  
19 jurisdictional discovery. Jurisdictional discovery was  
20 eventually ordered, but we have a Report and  
21 Recommendation denying the defendant's motion to dismiss  
22 on personal jurisdiction grounds. So, this would be a  
23 successive motion to dismiss. What I'm hearing and what  
24 I think would have to happen now is that the defendant  
25 would need to move to vacate the Report and

1 PROCEEDINGS 14

2 Recommendation that's outstanding or somehow it would  
3 need to be withdrawn for this to be procedurally  
4 appropriate.

5 THE COURT: Well, they could also move for  
6 summary judgment, couldn't they?

7 MS. GIELCHINSKY: They could move for summary  
8 judgment, yes; yes, they could --

9 THE COURT: Under Rule 56.

10 MS. GIELCHINSKY: Yes.

11 MR. SIEGFRIED: Your Honor, two points. First  
12 of all, the 12(b)(2) motion post jurisdictional  
13 discovery applies under, again, Second Circuit  
14 precedent; and, again, Judge Engelmayer has this in his  
15 decision, as do other courts. It applies the Rule 56  
16 legal standards in terms of that the motion must be --  
17 the plaintiffs are required to actually support the  
18 allegations, affidavits are supposed to be -- are to be  
19 on the basis of personal knowledge, documents have to be  
20 authenticated. So the legal standard, the Rule 56 legal  
21 standards is to admissibility of evidence and the like,  
22 are all applicable. It doesn't have to be Rule 56  
23 motions. Number two, the --

24 THE COURT: But in this case, if the Court  
25 doesn't have subject matter jurisdiction, that can be

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2 raised at any time.

3 MR. SIEGFRIED: Yes. I'm just simply saying  
4 the point that ~~your Honor~~ Your Honor -- I didn't see that  
5 ~~your Honor~~ Your Honor issued the Report and  
6 Recommendation with prejudice, either.

7 THE COURT: No. No, no.

8 MR. SIEGFRIED: Your Honor obviously ordered  
9 jurisdictional discovery, so I fail to grasp the legal  
10 significance of counsel's point. Jurisdictional  
11 discovery was ordered by you. It is now concluded, and  
12 you can always issue a supplemental Report and  
13 Recommendation so that the -- indeed, the whole purpose  
14 of the Federal Magistrates Act is to enforce and  
15 conserve judicial resources and to do things  
16 efficiently. So here we are. You had moved  
17 efficiently. You took the case, you ordered the  
18 discovery. We're applying for a motion, we can have our  
19 motion up in two or three weeks, whichever you decide,  
20 and then you can issue a supplemental Report and  
21 Recommendation if you choose.

22 THE COURT: Well, I want to hear the remainder  
23 of the plaintiffs' counsel's point.

24 MS. GIELCHINSKY: Are we --

25 THE COURT: --(Indiscernible)

MS. GIELCHINSKY: Well, I would also -- I mean, besides procedurally, this affects his motion to dismiss, unless the Report and Recommendation is somehow withdrawn. It's just not the proper vehicle right now for the defendant to use until we have an order from the District Court.

I'd also just point out that the Report and Recommendation didn't rely for personal jurisdiction purposes in finding personal jurisdiction on any of the transactions that are now, you know, proposed under ~~(indiscernible)~~ nesting theories. The Report and Recommendation found that, you know, the properly ~~---~~ plaintiffs ~~(indiscernible)~~ properly alleged that the aid provided to Hamas came about via money transfers through CAB's New York correspondent accounts. The defendant made the argument already that the 23 transfers initially alleged were decidedly not the proximate cause of plaintiffs' injuries.

But that wasn't the standard; the Court said that's not the standard. And, in any event, it doesn't change -- the jurisdictional discovery under which now we have 113 transfers totaling \$7.5 million dollars, as opposed to 23 transfers totaling \$135,000, doesn't change the jurisdictional analysis on the specific

customers; that's not what the personal jurisdiction analysis is contingent on. This Court rightly conducted an analysis comparing the number of transfers to *Licci's* dozens of transfers and Indosuez's six ~~(indiscernible)~~ transfers and came up with its conclusion that plaintiff had made a prima facie showing of personal jurisdiction. So the facts don't change it.

So it's not -- the 12(b)(2) motion, this is not the right vehicle right now. What plaintiffs propose the state of play would be is that the District Court issue an order on the Report and Recommendation. If the Court determines, if the District Court determines that the plaintiffs have failed to state a claim under JASTA ~~Jaske~~ or to satisfy personal jurisdiction elements, then we might need to amend. And if not, the Court's actual holding I think will make it much clearer what defendant's motion should be, whether it is a motion to reconsider or a Rule 56 motion or maybe -- maybe it would be appropriate at that point for defendant to submit a Rule 12(b)(2) motion. But, you know, at that point defendant can submit a pre-motion letter outlining what it's going to do.

MR. SIEGFRIED: If ~~your Honor~~ Your Honor wants me to respond, I will, but I think --

1 PROCEEDINGS 18

2 THE COURT: I don't -- well, we're getting into  
3 some of the merits. I don't see a reason procedurally  
4 why this motion shouldn't be teed up. It can be teed up  
5 either as -- it can be teed up as a Rule 12 and/or Rule  
6 56 motion, frankly. And I'm not making any decisions on  
7 the merits. Both sides are making reasoned arguments,  
8 and I'm going to have to consider them both carefully  
9 after it's briefed. But procedurally, I don't see why  
10 we can't set a schedule because these are  
11 (indiscernible) that are briefed, anyway. Plaintiffs  
12 have to add the transactions that you found during --  
13 the additional transactions and provide that list. Can  
14 you do that in a week from today?

15 MS. GIELCHINSKY: Yes, ~~your Honor~~Your Honor.

16 THE COURT: Okay. So it --

17 MS. GIELCHINSKY: Your Honor --

18 THE COURT: If you provide --

19 MS. GIELCHINSKY: I'm so sorry to interrupt.

20 THE COURT: Yes, go ahead.

21 MS. GIELCHINSKY: I'm so sorry, ~~your Honor~~Your  
22 Honor. This is difficult on the phone. I'm just -- I'm  
23 here with my colleague Gary Osen, and he was just hoping  
24 to make a point to add.

25 THE COURT: Okay.

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2 MR. GARY OSEN: Yes, ~~your Honor~~ Your Honor.

3 Gary Osen for the plaintiff. Do I understand firstly  
4 that ~~your Honor~~ Your Honor is issuing an order vacating  
5 the R & R?

6 THE COURT: No, absolutely not. I'm just  
7 ordering briefing on post-jurisdictional discovery.  
8 Judge Woods, I don't know when he's going to rule on the  
9 objections to the R & R. He may rule on it before this  
10 is even fully briefed.

11 MR. OSEN: Well, then, ~~your Honor~~ Your Honor --

12 THE COURT: So this may be a completely moot  
13 point.

14 MR. OSEN: So, but, ~~your Honor~~ Your Honor,  
15 here's the question procedurally in terms of the  
16 schedule. Ordinarily, again, because this is a strange  
17 procedural animal, the defendant has not cited any case  
18 (indiscernible) -- and Vasquez is not on point -- on  
19 what happens in a case where jurisdiction has been found  
20 sufficient, as the R & R indicates. And then there's  
21 discovery subsequent to that where it's a 12(b)(2)  
22 motion as opposed to a Rule 56. But the issue is even  
23 more complex here, and this is why I wanted to interject  
24 for a moment, because the nature of the claim, that is,  
25 the transactional record here, is intrinsically tied up

1 with the merits. And the defendants' arguments and  
2 their objections, for example, raise issues of proximate  
3 cause, which of course is directly -- goes to the merits  
4 of the case.

5  
6 So, I don't know how in a circumstance like  
7 this we would be able to respond to a brief that didn't  
8 have an operative Complaint that incorporated not just  
9 the transactions that are reflected in the chart but  
10 also reflect the corresponding allegations that tie the  
11 transactions to unlawful conduct. So, it's just a  
12 procedural question as to how they move under 12(b)(2)  
13 against a Complaint that doesn't have not just all the  
14 transactions but also the factual allegations that  
15 connect those transactions to the arising-from element  
16 of personal jurisdiction.

17 THE COURT: Well, look, that -- what you're  
18 arguing there is that can't be decided because of its  
19 inter -- one, you're saying it's Rule 56; that if it  
20 is -- I mean, I think defendants would be wise to  
21 characterize it as either/or -- but what I'm hearing is  
22 plaintiffs are arguing that under Rule 56(f) you would  
23 need more discovery because it's intertwined. I don't  
24 know if that's the case or not; I'm not making a  
25 decision on that in this call. What I'm saying -- and



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2 I'm not aware of any reason why this motion can't be  
3 teed up. So I'm going to start a briefing schedule.  
4 And under --

5 MR. OSEN: But, ~~your Honor~~ Your Honor, again --  
6 ~~your Honor~~ Your Honor, the question isn't about the  
7 briefing schedule; the question is about what Complaint  
8 they're moving against.

9 THE COURT: And you want to amend the Complaint  
10 to add additional information for jurisdiction? I don't  
11 know if that's required, given that you've had discovery  
12 and you will be able to submit the additional  
13 transactions by affidavit. I think both sides are going  
14 to be in agreement about the transactions that you  
15 found, what they are. And then you'll argue about the  
16 significance of the nested transaction and so forth.

17 MR. OSEN: Your Honor, this is Gary Osen again.  
18 I think there's a missing component here. And let me  
19 give you a concrete example. There are multiple  
20 entities in the transactional record that are  
21 jurisdictionally relevant from the plaintiffs'  
22 standpoint but for which there are no allegations in the  
23 Complaint about them. And I don't mean the transactions  
24 themselves; I mean who the counterparties to the  
25 transactions are. So, for example, just to take one at

random, the Halhul (ph) Zakat Committee, which was on the list of ~~HL~~<sup>LF</sup> unindicted co-conspirators. That's not in the Complaint currently, the operative version, but there are transactions to an account for Cairo Amman Bank for that entity. There are no allegations in the Complaint setting forth the relationship of the Halhul Zakat Committee to Hamas. ~~So~~<sup>So</sup>, it's not simply a question of putting in an affidavit as to the transactions; it's holistic. The Complaint and the transactions can only be evaluated together because the transactions themselves are the *actus reus*, if you will, the act of material support or substantial assistance that gives rise to the plaintiffs' claim.

MR. SIEGFRIED: Your Honor, if I might --

THE COURT: So you want to -- what you want to do is amend the Complaint to shore up and add the information that you found during jurisdictional discovery; is that what you're saying?

MR. OSEN: In order -- yes, in order to -- of course, we oppose any -- just so the record's clear, we think it's an improper motion, but if ~~your Honor~~<sup>Your Honor</sup>'s going to entertain it, then it should be against an operative Complaint that contains both the transactional record, which of course, will be reflected

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2 in the chart, but also reflect --

3 THE COURT: I mean, the Complaint is already  
4 like --

5 MR. OSEN: -- the allegation --

6 THE COURT: Mr. Osen, the Complaint's already  
7 like 250 pages. It's really long. I mean, what --

8 MR. OSEN: Your Honor, that's a function --

9 THE COURT: -- you're now going to add  
10 additional entities? That's sort of changing the  
11 target, isn't it?

12 MR. OSEN: It's what comes about as a result of  
13 discovery. I mean --

14 MR. SIEGFRIED: Your Honor, may I -- I'm sorry.

15 MR. OSEN: Let me just conclude. Your Honor,  
16 if defendant is going to be permitted, as we think it's  
17 wholly improper procedurally, but if the defendant is  
18 going to be permitted to proceed in this fashion, then  
19 it must be against an operative Complaint that contains  
20 the plaintiffs' allegations in full and which reflect  
21 the discovery that has been yielded in this case.

22 THE COURT: Okay, I'm just not sure that's the  
23 case because we have a notice pleading standard; and to  
24 the extent there is additional facts that demonstrate,  
25 in your view, that the defendant was engaging in serving

1 a customer to aid terrorism, I don't understand why all  
2 of those transactions have to be in the Complaint.  
3 That's not the way it normally works. Normally, there's  
4 notice pleading and then there's discovery and then  
5 additional facts are brought to bear without amending  
6 the Complaint. So I'm not sure that I agree with you,  
7 Mr. Osen, that it's necessary to be in the Complaint.  
8 I'd like to hear from defendants on that.

10 MR. OSEN: Your Honor, may I, ~~your Honor~~Your  
11 Honor? Apologies. One last point on that before you  
12 hear from defendant?

13 To be clear, on a 12(b)(2) motion, the  
14 allegations in the Complaint, even on a renewed 12(b)(2)  
15 are deemed to be true for purposes of the motion, with  
16 the exception of the jurisdictional component, which is  
17 based on the facts produced or the evidence produced.  
18 So the issue isn't whether we append or integrate 100-  
19 plus transactions into the Complaint; it's the  
20 allegations concerning the entities who are the  
21 customers of the bank that are germane. And there are  
22 only two ways that that can be accomplished, either by  
23 amending the Complaint and treating those allegations as  
24 true, or doing this at summary judgment after completion  
25 of fact and expert discovery. And if the defendants

1 want to move under -- without full discovery, then it  
2 has to be procedurally against an operative Complaint  
3 that incorporates those allegations. Otherwise, we say  
4 in our papers, well, look, there's a transaction for the  
5 Halhul Zakat Committee, and the defendant says, "Who is  
6 that? They're not the Complaint; that has no  
7 jurisdictional relevance."

8  
9 MR. SIEGFRIED: Your Honor, would you like me  
10 to comment at this point?

11 THE COURT: Yes. Go ahead.

12 MR. SIEGFRIED: Briefly, Mr. Osen needs to  
13 refer to the law, (indiscernible). I do not know of any  
14 case that supports~~puts~~ a good bit of what he said, but  
15 he will make those arguments in response to the motion,  
16 I guess.

17 With respect to this whole idea of amending the  
18 Complaint, ~~your Honor~~Your Honor has it precisely  
19 correct. There is nothing -- he has -- you have allowed  
20 three amendments -- not you've allowed -- there was an  
21 initial Complaint; you have permitted two amendments of  
22 the Complaint already. So we have versions 1.0, 2.0 and  
23 3.0. He now says I want to amend the Complaint again  
24 based upon the jurisdictional discovery. That is what  
25 the plaintiffs are contending. The jurisdictional

discovery that he refers to is the jurisdictional discovery that he and the plaintiffs produced to us specifically. Documents that were produced by Arab Bank in *Linde* -- you're quite familiar with those, I know, because you had the whole subpoena issue about that; and of course, it was unsurprising that Arab Bank has now come back and said we don't have any additional documents beyond those that we previously provided to plaintiffs. They are the documents -- and those were produced back in 2006 or something like that, '07. He has documents from the HLF criminal trial which were in his possession that he produced to us, that were produced and therefore in his possession since, I believe, around 2008. And he has documents from the NatWest proceedings where Mr. Osen was the counsel and where the documents produced in NatWest; and those -- I don't know exactly when they were produced, but they were certainly produced prior to 2016, I assume some point between 2007 and 2016.

So for Mr. Osen -- and Mr. Osen drafted in 2019, so anywhere from six to 10 years after these documents were in his possession -- he drafted the ~~DAD~~ CAB Complaint. And he now says, oh, I should be allowed to now do a fourth amendment of the Complaint to allege

facts that I have in my possession that I could have asserted previously and therefore let me first go and amend my Complaint. This argument is also different than what the plaintiff said in court to you two or three months ago, where they referred to amending the Complaint to add transactions they learned about after filing the Amended Complaint. There were no transactions thus far that I'm aware of that they found about after filing the Amended Complaint. All of the transactions occurred before. If they have something that they want to do under the 12(b)(2) motion -- and perhaps we will restate it as an alternative, as you suggest -- and a Rule 56 -- they have the ability to put in factual evidence in support of an allegation. But other than -- other than giving this -- the chart, the jurisdictional allegations in this Complaint are in paragraphs five through eight. We are obviously not going to move on -- I assume he has changed his theory, we'll see his chart, assuming this chart is the chart we're moving under. Those are the allegations, he has the facts, we will make our arguments. He will have an opportunity to put in his factual support for the allegations. It's a 12(b)(2) post-jurisdictional motion. Again, I don't emphasize a distinction between

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2 that and the legal standard under Rule 56 because the  
3 Court says it's really the same. It is by definition a  
4 motion outside of the pleadings. So as long as he has  
5 factual evidence to support his assertion that the  
6 transaction that the claims arise out of or relate to  
7 the transaction, he is entitled to put that in. It's  
8 not --

9 THE COURT: Okay. I've --

10 MR. SIEGFRIED: -- he cannot -- and he can't  
11 prevail on an allegation, so there's no reason for --

12 THE COURT: Okay. Thank you.

13 MR. SIEGFRIED: -- for that.

14 THE COURT: I have heard enough from both  
15 sides. I am going to allow the motion. Plaintiffs  
16 should provide an updated chart by January 27th.  
17 Defendants should then file their motion by February 17.  
18 It should be a motion under Rule 12; or, in the  
19 alternative, under 56. And the plaintiffs should file  
20 their opposition -- let's see, I said the 17th --  
21 opposition due March 10; reply due March 24.

22 And you can make whatever procedural -- to the  
23 extent plaintiffs want to make a procedural argument and  
24 you think it's 56 versus Rule 12, go right ahead; I'll  
25 take a look at that. And, you know, I'll evaluate



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2 everybody's arguments carefully once it's fully briefed.

3 MR. OSEN: This is Gary Osen, ~~your Honor~~Your

4 Honor. Two points, if I may? One on the schedule. I

5 think, if I heard correctly, we get a week less time

6 than the defendant~~s~~ for our --

7 THE COURT: No. I'm giving them three weeks

8 after you give them the renewed charts.

9 MR. OSEN: Right. And then we have until when?

10 THE COURT: So I was going to give you three

11 weeks. Is that --

12 MR. OSEN: What was the date for our response?

13 THE COURT: So theirs was going to be due

14 February 17, and I was going to have yours due

15 March 10th.

16 MR. OSEN: Okay, that's fine, ~~your Honor~~Your

17 Honor.

18 THE COURT: And then reply due the 24th.

19 MR. OSEN: The other issue, ~~your Honor~~Your

20 Honor, is, is it possible if you can set forth in your

21 minute order so that we have a record that you denied

22 leave to amend?

23 THE COURT: Well, there has not been a formal

24 motion to amend, so I have not ruled on such a motion.

25 If you want to make a motion to amend, you have to

1  
2 prepare an Amended Complaint, you have to seek the  
3 defendant's permission to make that amendment. If they  
4 don't agree, then you have to make a motion. So I have  
5 not ruled on a motion to amend; I have not denied a  
6 motion to amend. That has not been briefed. I haven't  
7 seen an Amended Complaint, nor have defendants. So I'm  
8 not going to include that in the minute entry.

9 MR. OSEN: Okay, ~~your Honor~~ Your Honor, I  
10 understand. My question, then, is this: To the extent  
11 that the defendant is moving on February 17th, they'll  
12 be moving against the operative Complaint plus the  
13 chart, as I understand that; is that correct?

14 THE COURT: That's what I understand.

15 MR. OSEN: Okay. And so depending -- I mean,  
16 one way, of course, that would clarify this further is  
17 if the defendant actually filed a pre-motion letter that  
18 set forth exactly what the basis of the motion is. Then  
19 we could at least ascertain whether we're proceeding  
20 under one theory or another and what the evidentiary  
21 standard is.

22 THE COURT: I don't know that that is  
23 necessary. I'm going to -- I'm waiving the requirement  
24 of a pre-motion letter because we've been talking about  
25 this for every single court conference since we've been

1  
2 doing jurisdictional discovery. I don't think it's any  
3 secret as to what the defendant's s theory is.

4 MR. OSEN: I still don't understand what the  
5 theory is, but perhaps ~~your Honor~~ Your Honor can  
6 enlighten us.

7 THE COURT: Well, I think the defendant ~~s~~ is ~~are~~  
8 in the best position to do that. But the basic thing  
9 that they've described is that the allegations in the  
10 Complaint are not true, that your theory of jurisdiction  
11 has changed; and they're moving on that basis. That's  
12 my understanding. I don't know if that's correct or  
13 not. I'll take a look at the briefing. And I  
14 understand you to be saying jurisdictional discovery has  
15 only increased the jurisdictional basis to be here  
16 because you've got more transactions. That is the  
17 dispute, as I understand it.

18 MR. OSEN: Okay. I guess the question is,  
19 then, just for us, because I don't want the Court to,  
20 you know, be blindsided here, but obviously, depending  
21 on what we receive on January 20 -- I'm sorry, on  
22 February 17th from the defendant, we may very well move  
23 to amend the Complaint or move to convert it to a Rule  
24 56 motion, depending on what we see --

25 THE COURT: Sure, absolutely.

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2 MR. OSEN: -- and that might affect the  
3 schedule, of course.

4 THE COURT: Okay.

5 MR. OSEN: All right. Thank you.

6 THE COURT: That's within your right, if you  
7 think that's appropriate.

8 Anything else?

9 MR. SIEGFRIED: Not from defendant. Thank you,  
10 ~~your Honor~~Your Honor.

11 THE COURT: Okay. Well, thanks, everybody.  
12 I'll look forward to reviewing your papers.

13 MR. SIEGFRIED: Your Honor, actually -- I'm  
14 sorry, I just feel like -- are we still following your -  
15 - are we --

16 THE COURT: My schedule? Yes.

17 MR. SIEGFRIED: No, no, no, the page limit, the  
18 page limit to 25 pages.

19 THE COURT: Yes, definitely the page limit.  
20 Yes.

21 MR. SIEGFRIED: Okay. Thank you, ~~your~~  
22 ~~Honor~~Your Honor.

23 THE COURT: Okay. Thank you. I'll issue a  
24 Scheduling Order. Thank you. Bye-bye.

25 (Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Averbach et al v. Cairo Amman Bank, Docket #19-cv-00004-GHW-KHP, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature \_\_\_\_\_

Carole Ludwig

Date: January 23, 2023